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Ryan Q. Hodges v. Reese S. Howell : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

RYAN Q. HODGES, an individual Plaintiff-Appellant, v. REESE S. HOWELL, an individual, and SALT LAKE MORTGAGE CORPORATION, a Utah Corporation, Defendants-Appellees.	)	Appeal No. 990606-CA District Case No. 980910505 Argument Priority 15
REESE S. HOWELL, Third-Party Plaintiff, v. LINDA M. HODGES, Third-Party Defendant.	)	

REPLY BRIEF OF APPELLANT RYAN Q. HODGES

Appeal from the Third District Court
of Salt Lake County
Honorable Homer F. Wilkinson

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TABLE OF CONTENTS
Reply Brief of Appellant

TABLE OF CONTENTS CONTINUED

TABLE OF AUTHORITIES
Brief of Appellant

Cases

Statutes, Rules and Other Related Authorities

Statutes

Page

ARGUMENT

I. THIS COURT SHOULD REVERSE THE ORDER OF THE TRIAL COURT WHICH DISMISSED HODGES' COMPLAINT WITH PREJUDICE AS BARRED BY THE STATUTE OF LIMITATIONS.

A. The One-Year Statute of Limitations for Seduction Set Forth in § 78-12-29(4) Does Not Apply to Hodges' Alienation of Affections Claim.

1. Hodges' Complaint does not allege a claim for or facts sufficient to support a clair for seduction.

Despite Howell's claim that Utah Code Ann. § 78-12-29(4) "applies to any claims arising out of Mr. Howell's alleged seduction of Ms. Hodges" (Howell Brief at 14), the simple fact remains that Hodges' Complaint does not allege a cause of action for "seduction," nor does it plead sufficient facts to support such a claim. (R. at 1.) As noted in Hodges' initial brief, the Utah legislature has provided clearly defined parameters for seduction claims which must involve sexual relations with "[a]n unmarried individual, under 18 years of age. . .." Utah Code Ann. § 78-11-4 (1996).

Had the legislature left the term "seduction" undefined, the question of whether an alienation of affections claim ("AOA") is sufficiently related to seduction to fall within the limitations purview of § 78-12-29(4) would be open to further legal analysis. In the current instance, however, not only has Hodges not alleged a claim for seduction, but his AOA claim is clearly distinguishable from a

claim for "seduction" as contemplated in § 78-12-29(4). Had Hodges filed a complaint for seduction (and if the statute of limitations were not an issue), Howell would have successfully defended the claim by asserting that he did not have sexual relations with an unmarried individual under the age of 18.

2. The Tolman analysis does not support Howell's position that alienation of affections claims are subject to a one-year statute of limitations.

Howell further asserts that the Utah Supreme Court analysis in Tolman v. K-Mart Enterprises of Utah, 560 P.2d 1127 (Utah 1977) "dictates that all such claims (those involving damage to marital interests) should be subject to the same one-year statute of limitations." (Howell Brief at 19.) However, Howell's conclusion misapplies the analysis in Tolman. In Tolman, the court rejected an argument that a claim for "false arrest" should be subject to the "catch-all" statute of limitations provision because it was not specifically included in the language of any other provision. Tolman, 560 P.2d at 1127. The court noted that the "[s]olution to the problem thus presented is found in looking to the basic nature of the alleged violation of the plaintiff's right." Id. at 1128. In essence, the court found that "false arrest" was a sub-component of "false imprisonment," and therefore was subject to the one-year statute of limitations.

Applying the Tolman analysis to the current case requires a comparison between AOA and seduction claims by "looking to the basic nature of the alleged

violation of the plaintiff's right." In AOA claims, the alleged violation of the plaintiff's rights relates to the loss of society, love, companionship, protection, and affection of a spouse. See Norton v. Macfarlane, 818 P.2d 8, 12 (Utah 1991). Seduction claims, under Utah law, relates to the rights of an unmarried minor to be guarded from inappropriate sexual relations. See Utah Code Ann. § 78-11-4 (1996); see also § 78-11-5 (1996) (permitting parents or guardians to prosecute claims for the seduction of minor children). An analysis of the basic nature of AOA and seduction claims reveals that they have little in common other than possibly sexual intercourse which may or may not be part of an AOA claim. Whereas AOA claims protect those rights inherent to the marital relationship, seduction claims have nothing to do with marriage, and, instead, protect the rights of minor children.

Certainly, the Utah Supreme Court holding in Tolman that false arrest and false imprisonment violate the same rights does not require this Court to find that seduction and AOA are similarly related. In fact, the Tolman analysis mandates the opposite. Based on the sound legal reasoning in Tolman, seduction and AOA claims bear little similarity in terms of the violation of plaintiffs' rights, and therefore should not be subject to the same statute of limitations period.

3. In Utah, seduction, unlike alienation of affections, is not a cause of action arising from interference with the marital relationship.

Howell cites a line of Kentucky cases as the primary legal support for his proposition that all causes of action arising from interference with the marital relationship are governed by the same statute of limitations. (Howell Brief at 16). However, despite Kentucky common law, the fact remains that in Utah, seduction is not a cause of action that arises from interference with the marital relationship. As amply noted in previous discussion, Utah law limits seduction claims to situations involving non-married minors. By definition, the concept of seduction and interference with marital relations are therefore mutually exclusive.

However, even if seduction did arise from interference with the bonds of matrimony, sufficient case law supports the proposition that AOA claims are not subject to the same statute of limitations as other marital-related claims.

4. Other jurisdictions have assigned different limitations periods to alienation of affections claims and the similar cause of action of criminal conversation.

While seduction claims and AOA claims are clearly distinguishable, similarities exist between AOA and criminal conversation. The tort of criminal conversation involves "the right to exclusive sexual intercourse with a spouse." Norton, 818 P.2d at 16. As a practical matter then, actions for AOA can and may often involve the tort of criminal conversation as a contributing element. At the

very least, both claims involve damage to the marital relationship. However, despite the frequent co-existence of these causes of action, courts have found them sufficiently distinguishable to apply a different statute of limitations to each.

It is against this legal backdrop that Howell misguidedly claims that "all causes of action alleging interference with the marriage relation -- whether denominated as criminal conversation, AOA, or seduction -- are subject to the same statute of limitations." (Howell Brief at 19). As noted above, Howell's analysis is flawed in that the cause of action for seduction, in Utah, by definition, does not involve the marital relationship. Regardless, however, the cases cited by Howell (that apply the same statute of limitations to all claims for interference with the marital relationship) represent the minority position. In essence, only one of the jurisdictions cited by Howell (Kentucky) squarely supports the proposition asserted in Howell's argument.

The antiquated California cases cited by Howell do not address the issue of similar limitations periods being applied to actions addressing interference with the marital relationship. Instead, these cases simply classified AOA as a cause of action involving infringement of personal rights, and therefore one that fell within the ambit of the limitations period applicable to personal injury. See Tofte v.

Tofte, 54 P.2d 1137 (Cal. Dist. Ct. App. 1936); Harp v. Ferrell, 300 P. 978 (Cal. Dist. Ct. App. 1931).[1]

In the other case cited by Howell, Rheudasil v. Clower, the Supreme Court of Tennessee held that the same statute of limitations applied to both criminal conversation and AOA, noting that "when the Legislature provided that the one year statute of limitations should apply to an action for criminal conversation, it understood such to include an action for alienation of affections." 270 S.W.2d 345, 346 (Tenn. 1954). In citing Rheudasil as support for his position, Howell fails to address the subsequent history of the case. The Rheudasil court apparently misinterpreted legislative intent, because almost immediately after the Rheudasil opinion was issued (the following year), the Tennessee legislature enacted Tenn. Code. Ann. § 28-305 (1955) which explicitly provided a three-year limitations period for AOA claims.

This distinction between limitations periods for AOA and criminal conversation created by the Tennessee legislature and embodied in § 28-305 was later upheld by the Sixth Circuit in Roberts v. Berry, 541 F.2d 607 (6th Cir. 1976).

> The § 28-305 three-year statute explicitly applies to alienation of affections. Tennessee courts have long recognized the "distinction

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[1]In Utah, the statute of limitations for personal injury is typically four years, excepting claims for personal injury due to medical malpractice (two years), product liability (two years), or claims asserted a governmental agency (one year).

> between an action for criminal conversation and an action for alienation of affections. It is possible for a cause of action for either to exist without the other. 'While . . . [both actions are] founded on the injury to the right of consortium they are generally recognized as essentially different. The gravamen or gist of the action where it is for criminal conversation is the adulterous intercourse, and the alienation of affections thereby resulting is regarded as merely a matter of aggravation, whereas the gravamen in the other case is the alienation of affections with malice or improper motives.'"

Id. at 609 (quoting Darnell v. McNichols, 122 S.W.2d 808, 810 (Tenn. Ct. App. 1938)).

In Gibson v. Gibson, 402 S.W.2d 647 (Ark. 1966), the Supreme Court of Arkansas expressly rejected an argument to apply a one-year statute of limitations period, applicable to criminal conversation claims, to an AOA claim. The court first noted that it was reluctant "to apply a statute of limitations to actions not specifically enumerated therein" and then stated that, with regard to the limitations period, "[t]he statute is plain and the intent of the legislature must be gathered from the words used, and where the words used are unambiguous courts cannot add to or take from them their obvious meaning. The legislature used the specific term 'criminal conversation,' which had a well defined meaning." Id. at 648-49.[2]

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[2]The court further cited other jurisdictions, Bassett v. Bassett, 20 Ill. App. 543 (1886) and Deming v. Leising, 212 N.Y.S. 213 (N.Y. App. 1925), which also differentiated between AOA claims and those for criminal conversation. See id.

In Schneider v. Mistele, 158 N.W.2d 383 (Wis. 1968), the Supreme Court of Wisconsin described the difference between AOA and criminal conversation as follows:

> These two are twin causes of action, most often seen together, but they are not identical twins, certainly not Siamese twins. Adulterous intercourse is not a necessary element in an action for alienation of affections. Alienation of affections is not a necessary element for an action for criminal conversation, but goes only to the matter of damages. Each is a separate cause of action, each governed by a different statute of limitations, each clearly separable and distinguishable from the other.

Id. at 384 (emphasis added). Finally, in Miller v. Neill, 867 S.W.2d 523 (Mo. Ct. App. 1993), a Missouri appellate court specifically rejected an argument that the state's two-year limitations period for criminal conversation applied to an AOA claim. The Miller court noted that "the only statute of limitations applying to actions for alienation of affections" was the five-year limitations period "for any other injury to the person or rights of another" referred to in the state's existing statute, § 516.120 Rev. Stat. Mo. 1986. Id. at 529.

In short, even in jurisdictions that have a specific statute of limitations for analogous causes of action such as criminal conversation (which Utah does not have), most of those jurisdictions have nevertheless applied a different limitations period to AOA claims. Even if seduction could be classified in Utah as a cause of action based upon interference with the marital relationship, the well-founded

reasoning from a majority of jurisdictions that have compared marital interference actions justifies a separate statute of limitations analysis for AOA claims.[3]

5. In the absence of a specific statute of limitations for alienation of affections or criminal conversation, a statute in terms made applicable to all actions not otherwise covered governs.

In his brief, Hodges notes that the "catch all" statute applies to AOA actions because of AOA's conspicuous absence from Utah Code Ann. § 78-12-29(4) (listing other intentional torts). Howell's only response is that "Utah law does include a specific statute of limitations, referring to 'seduction.'" (Howell Brief at 16).

As noted above, and now almost belaboredly, the fact that seduction is enumerated in § 78-12-29(4) is irrelevant, let alone dispositive of the current issue. In Utah, the seduction cause of action does not involve interference with the marital relationship. Howell's argument that the specific reference to seduction automatically places AOA claims within the purview of § 78-12-29(4) is therefore without basis.

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[3]Of the seven jurisdictions that have compared AOA claims to those of criminal conversation for the purpose of statute of limitations analysis, only two (Kentucky and California) have held that the same statute of limitations applies to both causes of action, while five (Tennessee, New York, Wisconsin, Arkansas, and Missouri) have held that a different limitations period applies to the separate actions. See What Statute of Limitations Governs an Action for Alienation of Affections or Criminal Conversation, 46 A.L.R.2d 1086.

Moreover, the Utah Supreme Court has already spoken to the issue of intentional torts not specifically enumerated within § 78-12-29(4). In Olsen v. Hooley, 865 P.2d 1345, 1347 (Utah 1993), the court held that intentional infliction of emotional distress, although an intentional tort, was governed by the residual four-year limitations period found in § 78-12-25(3) and not the one-year period found in § 78-12-29(4) which governs other intentional torts. The court's decision in Olsen is supported by multiple jurisdictions which have likewise held that AOA claims are subject to a residual or general statute of limitations.[4]

Hodges' position is further supported by the fact that the Utah Supreme Court has warned against lumping together causes of action such as AOA, seduction, and criminal conversation (see Norton v. Macfarlane, 818 P.2d 8, 13 n.9 (Utah 1991)), while recognizing the similarities between AOA and intentional

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[4]See Schwartz v. Valinsky, 294 N.E.2d 446, 447 (Mass. App. Ct. 1973) (general limitations period for torts applies to claims for alienation of affections); see also Gibson v. Gibson, 402 S.W.2d 647, 650 (Ark. 1968) (one-year statute of limitations for false imprisonment, slander and assault which does not mention alienation of affections claims does not apply; instead, five-year statute of limitations for torts in general applies to claims of alienation of affections); Smith v. Lyon, 9 Ohio App. 141 (Ohio 1918) (holding that four year general or catch-all statute of limitations governing claims "not arising on contract" applied to alienation of affections claims); Farrow v. Roderique, 224 S.W.2d 630 (Mo. App. 1949) (applying general statute of limitations of five years to alienation of affections claims in the absence of a statute specifically enumerating claims for alienation of affections); Bassett v. Bassett, 20 Ill. App. 543 (Ill. 1886); Woodman v. Goodrich, 234 Wis. 565, 291 N.W. 768, 769 (Wis. 1940) (six-year limitation period for claims not arising in contract or not otherwise expressly provided for by statute applies to alienation of affections claims).

infliction of emotional distress (see Retherford v. AT&T Communications, 844 P.2d 949, 975 (Utah 1992)) which the court has explicitly excluded from a one-year limitations regime.

6. If this Court chooses to look to an analogous cause of action for determining the applicable statute of limitations, it should adopt the limitations period for either wrongful death or loss of consortium actions which are much more closely related to alienation of affections claims than are seduction claims.

Assuming, *arguendo*, that this Court determines that the catch-all statute does not govern AOA actions, the causes of action most analogous to AOA claims and which should be used for comparison are either wrongful death or loss of consortium, not seduction. While acknowledging the obvious similarities between wrongful death actions and AOA claims, Howell nevertheless argues that "the nature of the alleged wrongdoing is entirely different in an AOA case than in a wrongful death case." (Howell Brief at 21). To adopt Howell's reasoning would be to place a higher priority on the actions of the wrongdoer than on the rights of the victim. Whether by AOA or by wrongful death, Hodges' rights have been equally violated. He has lost the "society, love, companionship, protection and affection" of his wife, the very elements which form the basic right underlying both wrongful death actions and AOA claims. See Nelson v. Jacobsen, 669 P.2d 1207, 1215 (Utah 1983); see also Roberts v. Berry, 541 F.2d 607, 610 (6th Cir. 1976) ("The loss of consortium [is] the recognizable manifestation of" AOA claims);

Bland v. Hill, 735 So. 2d 414, 417 (Miss. 1999) ("This Court has said 'the purpose of a cause of action for alienation of affection is the 'protection of the love, society, companionship, and comfort that form the foundation of a marriage . . . .'" (citations omitted)); Lentz v. Baker, 792 S.W.2d 71, 74 (Tenn. Ct. App. 1989) ("The gist of the alienation of affections tort is the loss of consortium . . . it is a right of each to the company, cooperation, affection, aid and support of the other" (citations omitted)); Rheudasil v. Clower, 270 S.W.2d 345 (Tenn. 1954) (an action for AOA may be "instituted 'immediately after the society, affection and conjugal fellowship or consortium of the husband or wife are lost'"); Miller v. Neill, 867 S.W.2d 523, 526 (Mo. Ct. App. 1993) (AOA claims involve the plaintiff's loss of "consortium of his spouse").

In 1997, the Utah Legislature explicitly recognized a cause of action for loss of consortium which established the right of an individual to sue for loss of consortium resulting from personal injury sustained by the individual's spouse as a result of the wrongful or negligent actions of a third party. See Utah Code Ann. § 30-2-11 (1997). The statute of limitations accompanying this cause of action is the same that applies to the injured spouse's personal injury claim, i.e., a minimum of two years and as many as four.[5] See id. at § 30-2-11(3).

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[5] Excepting claims subject to the Utah Governmental Immunity Act which are governed by a one year statute of limitations.

In short, Howell inexplicably asks this Court to analogize a cause of action involving sexual relations with an unmarried minor to AOA claims which, by definition, involve married persons and which may or may not involve inappropriate sexual relations, instead of a cause of action that violates the exact same rights that AOA claims are designed to protect. Certainly, if this Court chooses to analogize AOA claims with other similar causes of action, rather than to apply the four-year residual statute, the strikingly similar actions for either wrongful death or loss of consortium are the more appropriate choice. In either case, under the residual four-year statute, the two-year wrongful death or the variable loss of consortium limitations period, Hodges' Complaint was filed in a timely manner and well within the appropriate limitations period.

B. When Properly Viewed in the Light Most Favorable to Hodges as the Non-moving Party, a Genuine Issue of Material Fact Exists as to when Hodges' Alienation of Affections Cause of Action Accrued. Therefore, Summary Judgment is Inappropriate.

Unlike other intentional tort actions such as libel, slander, assault or battery, determination of when a cause of action for AOA accrues requires much greater scrutiny of factual circumstances and is inherently fact intensive. A cause of action for AOA accrues "when the alienation is accomplished, i.e., when love and affection are finally lost." Retherford v. AT&T Communications, 844 P.2d 949, 975 (Utah 1992). The determination of when love and affection are finally lost "is

by nature ill-suited to resolution on motion for summary judgment. If such a determination is legally feasible at all, it is surely one which rests within the 'peculiar expertise of fact finders.'" Cannon v. Miller, 322 S.E.2d 780, 787 (N.C. Ct. App. 1984) (citations omitted).

In Cannon, a North Carolina appellate court reviewed a trial court decision which granted summary judgment to a defendant in an alienation of affections action. Id. at 780. Both the plaintiff and defendant in Cannon had submitted affidavits regarding their marital relationship. See id. at 786-87. The plaintiff's affidavit included, *inter alia*, statements regarding the timing and failure to reconcile the marital differences. See id. at 786. In reversing the trial court decision, the appellate court noted:

> It must be remembered that the papers of the non-moving party are to be "indulgently regarded." The allegations in plaintiff's affidavit were sufficient to raise a genuine issue on his claim. A final determination on the merits of this claim will obviously turn upon the credibility of the witnesses and the weight of evidence.

Id. In short, the "fact-specific nature of [AOA] cases" (See Coachman v. Gould, 470 S.E.2d 560, 562 (N.C. Ct. App. 1996)) requires an even greater emphasis on the adjudicative requirement that the court must "take as true evidence favorable to the non-movant [and that e]very reasonable inference from the evidence must be indulged in favor of the non-movant and any doubts resolved in [his] favor." Greenway v. Greenway, 693 S.W.2d 600, 602 (Tex. App. 1985) (citations omitted);

see also Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991) (generally, summary judgment is appropriate only when, after viewing the facts in the light most favorable to the non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law).

In the current case, in the face of a cause of action ill-suited to resolution by summary judgment, the trial court erred by finding, without further explanation, that "there is no genuine factual dispute that the alienation of affection to the Plaintiff in this case occurred more than one year prior to October 20, 1998." (R. at 211). Despite the trial court's finding, the Record shows that a genuine factual dispute indeed existed as to when Linda Hodges' affections were finally lost. Hodges and his then wife had attended marriage counseling sessions during the first quarter of 1997, (R. at 139), Hodges felt that his wife's affections had not been irreparably lost even after divorce proceedings were initiated, (R. at 189), and Hodges believed, based on Linda Hodges' and Howell's representations, that the two were not having an "affair" until they admitted to the affair during the divorce proceedings in October 1997. (Id.). Given the existence of disputed facts regarding when Linda Hodges' affections were finally lost, this case was not ripe for summary judgment, especially given the trial court's responsibility to make every reasonable inference and evidentiary indulgence in Hodges' favor.

This case, like many other AOA cases, can only be properly decided by relying on the "peculiar expertise of fact finders." Hence, the trial court erred by disposing of the case by way of summary judgment.

Conclusion

For the foregoing reasons, Hodges respectfully requests that this Court reverse the trial court's decision granting Howell's Motion for Summary Judgment and remand the case to the trial court for a jury trial.

Dated this 14 day of March 2000.

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VIII. Certificate of Service via First Class Mail

I CERTIFY that on March 14, 2000, I served two copies of the foregoing Reply Brief of Appellant on the following person at the following address:

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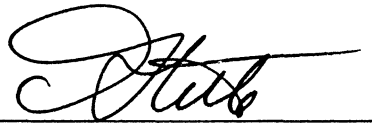
by mailing by first class mail with sufficient postage two true and accurate copies of the Reply Brief of Appellant. Said copies were placed in a sealed envelope addressed to counsel for Defendant/Appellee at the address set forth above.



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